

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CORNELIUS LOPES

Plaintiff,

v.

FREMONT FREEWHEELERS, et al.,

Defendants.

No. C 07-6213 PJH

**ORDER OF DISMISSAL AS TO
CERTAIN DEFENDANTS**

On November 2, 2007, pro se plaintiff Cornelius Lopes filed this action in Alameda County Superior Court, and on November 8, 2008, he filed a first amended complaint naming 31 defendants – (1) Fremont Freewheelers; (2) K&K Insurance; (3) USA Cycling; (4) Northern California and Nevada Cycling Association (NCNCA); (5) Robert Parker; (6) Lawrence Upthegrove; (7) Lloyd Rath; (8) Richard Brockie; (9) Gary Birch; (10) Sally Wilson; (11) Jason Sage; (12) Tim O'Hara; (13) Jeff Wrong [or Wong]; (14) Joseph Dale Wren; (15) C.B. Ellison; (16) Bryan [or Byron] Sheppard; (17) Larry Nolan; (18) Steve Grusis; (19) Larry Rosa; (20) Fremont Freewheelers Race Team; (21) Lind[a] Buffetti; (22) Joe Baughman; (23) Peter Allen; (24) FFBC Race Team; (25) Alameda County District Attorney; (26) Newark Police Department; (27) Casey Carrington; (28) Jim Davis; (29) Deputy District Attorney Shara Mesic; (30) Deputy District Attorney Lisa Faria; and (31) Deputy District Attorney D.A. Petagrew.

1 The incident that forms the basis of the complaint occurred on June 12, 2004. On
2 that date, plaintiff was jogging at the Stevenson Technology Park in Newark, and was
3 involved in a collision with one or more bicyclists who were participating in a race. Plaintiff
4 asserts that some of the bicyclists or race organizers claimed that he had caused the
5 accident and falsely accused him of battery and hate crimes; that the Newark Police
6 Department conducted an inadequate investigation; and that the Alameda County District
7 Attorney falsely charged him with battery and hate crimes, for which he was criminally
8 prosecuted. Plaintiff was not convicted of the charges.

9 On December 5, 2007, plaintiff filed a "proof of service" with the Superior Court
10 stating that copies of the summons and complaint had been mailed to 28 defendants –
11 Fremont Freewheelers; K&K Insurance; USA Cycling; Northern California and Nevada
12 Cycling Association; Robert Parker; Larry Upthegrove; Lloyd Rath; Richard Brockie; Gary
13 Birch; Sally Wilson; Jason Sage; Tim O'Hara; Joseph Dale Wilson; C.B. Richard Ellison;
14 Bryan [or Byron] Sheppard; Larry Nolan; Steve Grusis; Linda Buffetti; Joe Baughman;
15 Peter Allen; FFBC Race Team; Alameda County District Attorney; Newark Police
16 Department; Casey Carrington; Jim Davis; Deputy District Attorney Shara Mesic; Deputy
17 District Attorney Lisa Faria; and Mrs. Pettigrew – with a written notice and for
18 acknowledgment of receipt.

19 On December 7, 2007, defendant CB Richard Ellis (sued as "C.B. Richard Ellison"),
20 removed the case. On December 13, 2007, CB Richard Ellis filed a motion to dismiss.

21 On January 10, 2008, defendants Joseph Dale Wren, Newark Police Department,
22 and Jim Davis filed a notice of appearance.

23 On March 10, 2008, the court granted CB Richard Ellis' motion to dismiss the claims
24 asserted against it as time-barred.

25 Prior to April 15, 2008, no summons was issued by the clerk of this court. On April
26 15, 2008, summons was issued for 23 defendants – Fremont Freewheelers; K&K
27 Insurance; USA Cycling; Northern California and Nevada Cycling Association (NCNCA);
28 Robert Parker; Larry Upthegrove; Lloyd Rath; Richard Brockie; Gary Birch; Sally Wilson;

1 Jason Sage; Tim O'Hara; Bryon Sheppard; Larry Nolan; Steve Grusis; Linda Buffetti; Joe
 2 Baughman; Peter Allen; Alameda County District Attorney; Casey Carrington; Deputy
 3 District Attorney Shara Mesic; Deputy District Attorney Lisa Faria; and Mrs. Pettigrew. On
 4 April 16, 2008, summons was issued for the Newark Police Department. No summons was
 5 issued for Jeff Wrong [or Wong]; Joseph Dale Wren; Larry Rosa; Fremont Freewheelers
 6 Race Team (as distinct from the Fremont Freewheelers); FFBC Race Team; or Jim Davis.

7 On April 30, 2008, defendant Larry Nolan filed a notice of appearance.

8 As of May 2, 2008, plaintiff had filed no return of service on any defendant. No
 9 defendant apart from CB Richard Ellis, Larry Nolan, Newark Police Department, Jim Davis,
 10 and Joseph Dale Warren had made an appearance.

11 Accordingly, the court issued an order to show cause directing plaintiff – no later
 12 than May 16, 2008 – either to file a proof of service of the summons and complaint on the
 13 defendants who had not made an appearance, or to state in writing why the court should
 14 not dismiss those defendants from the case pursuant to Rule 4(m).¹

15 The 26 defendants who had not made an appearance as of May 2, 2008, were
 16 Fremont Freewheelers; K&K Insurance; USA Cycling; Northern California and Nevada
 17 Cycling Association (NCNCA); Robert Parker; Lawrence Upthegrove; Lloyd Rath; Richard
 18 Brockie; Gary Birch; Sally Wilson; Jason Sage; Tim O'Hara; Jeff Wrong [or Wong]; Bryan
 19 [or Byron] Sheppard; Steve Grusis; Larry Rosa; Linda Buffetti; Joe Baughman; Peter Allen;
 20 Fremont Freewheelers Race Team; FFBC Race Team; Alameda County District Attorney;
 21 Casey Carrington; Deputy District Attorney Shara Mesic; Deputy District Attorney Lisa
 22 Faria; and Officer Petagrew.

23 Between May 7, 2008, and May 13, 2008, defendants Larry Nolan; Linda Buffetti;
 24 USA Cycling, Inc.; Deputy District Attorney Mesic; Deputy District Attorney Faria; and
 25 Officer Petagrew filed motions to dismiss.

26 On May 16, 2008, plaintiff filed a response to the order to show cause, and also filed

27
 28 ¹ The order indicated that the court would start counting the 120 days from December
 7, 2008, the date of removal.

1 proof of service of the summons and complaint on defendants Fremont Freewheelers; USA
2 Cycling; Richard Brockie; Gary Birch; Sally Wilson; Jason Sage; Tim O'Hara; Linda Buffetti;
3 Deputy District Attorney Mesic; Deputy District Attorney Faria; and Officer Pettigrew.

4 On May 20, 2008, defendants Jason Sage and Gary Birch filed a motion to dismiss.
5 On June 2, 2008, defendants Newark Police Department, Joseph Dale Warren, and Jim
6 Davis; and defendants Fremont Freewheelers, Sally Wilson, Tim O'Hara, and Richard
7 Brockie filed motions to dismiss

8 Thus, the defendants who have not made an appearance and who have apparently
9 not been served (or for whom no proof of service has been filed) are K&K Insurance;
10 Northern California and Nevada Cycling Association (NCNCA); Robert Parker; Lawrence
11 Upthegrove; Lloyd Rath; Jeff Wrong [or Wong]; Bryan [or Byron] Sheppard; Steve Grusis;
12 Larry Rosa; Joe Baughman; Peter Allen; Fremont Freewheelers Race Team; FFBC Race
13 Team; Alameda County District Attorney (as distinct from the Deputy District Attorneys);
14 and Casey Carrington.

15 In the response to the order to show cause, plaintiff stated that he had served some
16 of the defendants, but requested that the court not dismiss the remaining defendants. He
17 did not explain, however, why he had failed to serve the unserved defendants (with the
18 exception of the Alameda County District Attorney, whom he claimed to have served at the
19 same time as the Deputy District Attorneys – although this is not clear from either the
20 summons or the proof of service). Instead, he simply attempted to argue the facts of the
21 case and why the case should proceed against some of the unserved defendants. Since
22 the time of the filing of the response to the order to show cause, plaintiff has not filed any
23 additional proofs of service.

24 In the order to show cause, the court cautioned that failure to file proofs of service
25 on all defendants who had not made an appearance would result in the dismissal of those
26 defendants. Accordingly, the court finds that defendants K&K Insurance; Northern
27 California and Nevada Cycling Association (NCNCA); Robert Parker; Lawrence
28 Upthegrove; Lloyd Rath; Jeff Wrong [or Wong]; Bryan [or Byron] Sheppard; Steve Grusis;

1 Larry Rosa; Joe Baughman; Peter Allen; Fremont Freewheelers Race Team; FFBC Race
2 Team; Alameda County District Attorney (as distinct from the Deputy District Attorneys);
3 and Casey Carrington must be DISMISSED pursuant to Federal Rule of Civil Procedure
4 41(b) for failure to prosecute.

5
6 **IT IS SO ORDERED.**

7 Dated: August 7, 2008



PHYLLIS J. HAMILTON
United States District Judge